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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

RONALD E. CHAMNESS AND RHEA ANN CHAMNESS,

Petitioners,

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., DEPOSIT INSURANCE BRIDGE BANK, N.A., OREGON, INC., WILLIAM R. TRIONE, AND ALINDA HILL WIKERT,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit And Request For Summary Reversal

---

RESPONDENT ALINDA HILL WIKERT'S BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE

This appeal was brought by Ronald Chamness and Wife, Rhea Ann Chamness ("Chamness"), complaining of dismissal of their suit against the Federal Deposit Insurance Corp. as receiver for, MBank Dallas, N.A. ("FDIC"), Deposit Insurance Bridge Bank, N.A., Oregon, Inc., William Trione, and Alinda Hill Wikert ("Wikert"). The District Court granted FDIC's Motion for Summary Judgment holding that Chamness was barred from asserting a homestead claim in seeking to invalidate a lien held by the FDIC under the doctrine set out in D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp., 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942) and 12 U.S.C. §1823(e). Despite repeated extensions of time, Chamness failed to provide any response to the FDIC's Motion for Summary Judgment; therefore, the District Court accepted as true all of the factual allegations contained in the Motion and entered a Memorandum Opinion and Order granting summary judgment.[1] The District Court also dismissed Chamness' claims pursuant to pending Motions for Sanctions filed by FDIC and Wikert seeking relief under Federal Rules of Civil Procedure 16(f) and 37 for Chamness' failure to file a Joint Pre-trial Order and for discovery abuse. In April of 1993, the Court entered its Final Order of Summary Judgment and Sanctions.

The Fifth Circuit reviewed the granting of summary judgment *de novo* and, in the absence of any response by Chamness, accepted all facts alleged by the moving party as true. After a review of the record, the Fifth Circuit determined that an alternative legal ground for affirming the District Court's decision was supported by the record. The Fifth Circuit concluded that because Texas law barred Chamness' claim, the question of whether Chamness was also barred by D'Oench, Duhme and/or §1823, or whether the District Court was correct in dismissing Chamness' claim as a sanction for discovery abuse and/or non-compliance with court orders, was not reached.

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[1] Although no summary judgment motion was filed on behalf of Wikert, the grant of a summary judgment in favor of FDIC constitutes a ruling on Chamness' claim as to title to the property in favor of Wikert. Wikert purchased the property pursuant to a contract with Chamness and an agreed foreclosure sale conducted by Oregon, Inc., an agent of MBank Dallas (now FDIC). Oregon, Inc., foreclosed on the lien which was being challenged by Chamness in the District Court.

II. SUMMARY OF ARGUMENT

Despite allegations of *sua sponte* acts by both the trial and the appellate courts, Chamness claims error for the reason that inconsistency exists between the various circuit courts of appeal in determining when a trial court judgment can be affirmed on legal grounds other than those relied upon by the trial court. Quite to the contrary, the circuit courts of appeal are consistent in applying this principle, a principle recognized by this Court as early as 1931 in the case of Langnes v. Green, 282 U.S. 531, 536-37, 51 S. Ct. 243, 75 L. Ed. 520 (1931) (the Court is "not limited to a consideration of the points raised by the [appellant], but 'must enter the judgment which should have been entered by the court below on the record before it'"). The authority cited by Chamness is simply not applicable.

Significantly, the evidence which Chamness claims he would have provided the trial court had he known an alternative legal theory would be relied upon is exactly the same evidence he should have provided in response to the motion for summary judgment in the trial court. Absent controverting evidence, the Fifth Circuit properly affirmed the summary judgment.

Chamness' claim that he was denied due process because the Fifth Circuit affirmed the summary judgment in favor of Wikert, when Wikert did not have a motion for summary judgment on file, fails to recognize the legal relationship between the two parties. Wikert is merely a subsequent purchaser of the property in question whose chain of title includes a foreclosure on the complained of lien. Wikert has committed no act giving rise to an independent claim, rather Chamness' claim against Wikert is dependent upon his ability to assert Texas homestead protections. The Fifth Circuit's conclusion that Chamness has "absolutely" no homestead claim is therefore a determination of Chamness' claim against Wikert.

III. ARGUMENT

A. Petitioner's Arguments Lack Focus

At first glance, it is not clear what action of the lower courts Chamness claims to be in error. Under "Question Presented," Chamness questions whether a trial court or a court of appeals has

the ability to grant or affirm a summary judgment *sua sponte* or on grounds not presented in the motion. Id. However, by Chamness' own account of the case, the **trial court** judgment was granted on proper motion and on a ground properly pled. Id. at p. 2. Therefore, logically, the actions of the trial court cannot be, and are not being, challenged.

As to *sua sponte* actions, Chamness implies that the Fifth Circuit acted "on its own will or motion... without prompting or suggestion." Black's Law Dictionary, p. 1277 (5th Ed. 1979). But Chamness readily admits the Fifth Circuit was reviewing the grant of a summary judgment by the District Court, and affirmed on an alternative legal theory. Id. As such, the Fifth Circuit did not **grant** summary judgment, *sua sponte* or otherwise, therefore those cases cited by Chamness (for example, the Fountain case, which is distinguished at length below) discussing *sua sponte* acts of the appellate court are inapplicable.

The subsequent summary of arguments contained on pages 3 and 11 of the petition appears to clarify the issue somewhat. Here Chamness challenges a court of appeals' ability to affirm summary judgment on grounds other than those relied upon by the trial court by asserting (1) there is a lack of certainty between the appellate courts as to when the judgment can be affirmed on alternative grounds; and (2) the practice violates due process. Chamness then gets disoriented in his own lack of clarity by re-urging the *sua sponte* reference (pp. 7, 8, 10) and again questioning the powers of the trial court (pp. 8, 10). Chamness also challenges a grant of a summary judgment in favor of Respondent Wikert when no such action has been taken. Petition, p. 7-8. Rather Chamness again confuses the issues by failing to recognize that the only reason Wikert is involved in this suit is that she purchased the property in question with a chain of title that includes a foreclosure on the allegedly invalid lien. Therefore, a finding by the Fifth Circuit (and the District Court) that Chamness "has no legitimate homestead claim" is a determination on the entirety of Chamness claims and is necessarily a finding in favor of Wikert. Petitioner's Appendix A, p. 7. See also Respondent's Appendix A, p. 4a. In other words, if Chamness has no claim of title to the property, he has no claim against those who subsequently hold title.

In the end, the only argument which remains is under what conditions can a court of appeals render summary judgment on legal grounds not relied upon by the trial court. After peeling away the inconsistencies in his Petition, Chamness argues simply that the various courts of appeal are not consistent in applying the standards used for affirming summary judgments on an alternative legal basis and that the practice is in violation of due process. It is these arguments which are before the Court and which are addressed by this response.

B. The Standards of the Circuit Courts are Certain and Consistent.

1. *Fifth Circuit Affirmed the Summary Judgment on Other Grounds.*

In its Memorandum Opinion and Order of August 24, 1990, the District Court determined that Chamness was barred by D'Oench, Duhme and §1823(e) from asserting that the property in question was his homestead. Chamness had asserted in his Complaint that the property encumbered by the FDIC's lien was protected by the Texas homestead laws but offered no summary judgment evidence that the property was his homestead. On the other hand, the FDIC provided the Non-Homestead Affidavits of Chamness which stated that the property in question was **not** homestead. As a result, the District Court found that the representations made in the Non-Homestead Affidavits operated as a bar to his claim of homestead under Templin v. Weisgram, 867 F.2d 240 (5th Cir. 1989), cert. denied, 110 S.Ct. 63 (1989); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942); and 12 U.S.C. §1823(e). Petitioner's Appendix D, p. 9. More specifically, the District Court held the "federal protections of the FDIC override the homestead protection generally afforded by the Texas constitution." Id. Chamness' case was also dismissed as a sanction for failure to participate in the filing of a Joint Pretrial Order and other discovery abuse. Petitioner's Appendix D, p. 9.

On appeal, the Fifth Circuit did not consider FDIC protections afforded by D'Oench, Duhme or §1823(e) nor the dismissal of Chamness' claims as a sanction. Instead, as pointed out in the District Court's Order of April 29, 1993 (included as Appendix A), and Respondent Wikert's brief to the Fifth Circuit, the Fifth Circuit recognized that the uncontroverted summary judgment evidence established that **under Texas law** Chamness was estopped to assert home-

stead protections. More specifically, based upon the evidence before the District Court, it was uncontradicted that: (1) Mr. Chamness executed affidavits which disclaimed any homestead interest he may have had in the property; and (2) Mr. Chamness did not occupy the property in question at the time he executed the Non-Homestead Affidavits. Under Texas law, a homestead claimant is estopped to assert homestead rights in property if the claimant made a sworn declaration to the contrary and there was no actual use or possession of the property at the time of the sworn declarations. In re Niland, 825 F.2d 801, 808 (5th Cir. 1987); Patterson v. FDIC, 918 F.2d 540, 547 (5th Cir. 1990). In other words, when an owner of real estate is not occupying the property, while representing that the property is not homestead, the owner is estopped to later assert the homestead protections. Patterson, 918 F.2d at 547.

In upholding the District Court's ruling, the Fifth Circuit determined that it had the ability to affirm summary judgment on "grounds other than those stated by the district court." Petitioner's Appendix A, p. 6. In support of this conclusion, which Chamness finds to be in error, the Fifth Circuit cited the case of Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440, 444 (5th Cir. 1990). Recognizing the futility of challenging the right of a circuit court of appeals to apply the Alternative Basis Principal,[2] Chamness instead attempts to manufacture conflict between the various courts of appeal by claiming a "split of authority and [a] lack of clarity." Chamness' conclusions are misplaced.

2. *Standards of Circuit Courts of Appeal are Certain and Consistent.*

Before clearing up the alleged inconsistencies between the circuit courts created by Chamness' misinterpretation of authority, a review of an illustrative case from each circuit court is helpful. The opening comments of Chamness' Petition refer this Court to various opinions which reveal unwavering consistency in acknowledging the following rule:

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[2] For brevity, the appellate principal which allows a reviewing court to affirm summary judgment on an alternative legal basis supported by the record shall be referred to herein as the "Alternative Basis Principle."

> A court of appeals is free to affirm a district court's decision on any ground supported by the record, even if the issue is not pleaded, tried or otherwise referred to in the proceedings below.

See Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 n.8 (1st Cir. 1990); Alfaro Motors Company, Inc. v. Ward, 814 F.2d 883, 887 (2nd Cir. 1987); Johnson v. Orr, 776 F.2d 75, 83 (3rd Cir. 1985); Keith v. Aldridge, 900 F.2d 736, 739 (4th Cir. 1990) *cert. denied* 498 U.S. 900, 111 S. Ct. 257, 112 L. Ed. 2d 215 (1990); Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440, 444 (5th Cir. 1990); Hooks v. Hooks, 771 F.2d 935, 945 (6th Cir. 1985); Sally Beauty v. Nexxus Products Company, Inc., 801 F.2d. 1001, 1005 (7th Cir. 1986); Lane v. Peterson, 899 F.2d 737, 742 (8th Cir. 1990) *cert. denied* 498 U.S. 823, 111 S. Ct. 74, 112 L. Ed. 2d 48 (1990); Fidelity Financial Corporation v. Federal Home Loan Bank, 792 F.2d 1432, 1437 (9th Cir. 1986) *cert. denied* 479 U.S. 1064, 107 S. Ct. 949, 93 L. Ed. 2d. 998 (1987); Bath v. National Association of Intercollegiate Athletics, 843 F.2d 1315, 1317 (10th Cir. 1988); Estate of Whitt v. C.I.R., 751 F.2d 1548, 1558 (11th Cir. 1985) *cert. denied* 474 U.S. 1004, 106 S. Ct. 523, 88 L. Ed. 2d. 456 (1985). Chamness attempts to portray the decisions of Keith and Bernhardt as not requiring the alternative grounds to be supported by the record before the district court; however, a closer examination reveals that these cases also contain this requirement. Keith, 900 F.2d at 739; Bernhardt, 892 F.2d at 444.

This very Court has also applied the principal relied upon by the Fifth Circuit in cases where the record of the lower court is reviewed *de novo*, noting the Court is "not limited to a consideration of the points raised by the [appellant], but 'must enter the judgment which should have been entered by the court below on the record before it.'" See Langnes v. Green, 282 U.S. 531, 536-37, 51 S. Ct. 243, 75 L. Ed. 520 (1931). The Fifth Circuit's review of the summary judgment was a *de novo* review of the record. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). This Court has also ruled similarly in Jaffke v. Dunham, 352 U.S. 280, 281, 77 S. Ct. 301, 1 L. Ed. 2d 314 (1957) ("A successful party in District Court may sustain its judgment on any ground that finds support in the record.") and Dandridge v. Williams, 397 U.S. 471, 475 fn. 6, 90

S. Ct 1153, 25 L. Ed 2d 491 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not the ground was relied upon or even considered by the trial court").

3.*Chamness' Authority is Neither Determinative nor Controlling.*

The main thrust of Chamness' Petition is that the Fifth Circuit improperly affirmed a summary judgment on factual and legal theories not before the District Court, thereby depriving Chamness of any opportunity for rebuttal. Despite overwhelming authority from **all** of the Circuit Courts of Appeal and the United States Supreme Court to the contrary, Chamness attempts to create inconsistency in the "standards" used by the various appellate courts for utilizing this procedural tool. However, Chamness has failed to carefully review the authority he cites, authority which does not support his position.

Chamness primarily relies upon four cases. The first case, a Fifth Circuit opinion, recognizes the Alternative Basis Principle, but declines to apply it where a new defense was raised for the first time in a supplemental brief filed the day before oral argument. F.D.I.C. v. Laguarta, 939 F.2d 1231, 1240 (5th. 1991). The Court determined that it would not be proper under those circumstances to affirm on the newly injected theory. Id. In a footnote, however, the Court stated:

> We do not suggest that if the issues were implicit or included in those raised below or the evidence in support thereof, or if the record appears to be adequately developed in respect thereto, that affirmance may not rest thereon. However, this is not the case here.

Id. at 1240 n.20.

The second case cited by Chamness, Arlinghaus v. Ritenour, 622 F.2d 629 (2nd Cir. 1980), is similar to Laguarta. The Second Circuit first recognized its ability to affirm the ruling of the lower court on summary judgment on "any argument which is supported by the record" if: (1) the issue was adequately presented below; (2) the parties had a full opportunity to develop the relevant facts; and (3)

the appellate court had the benefit of thorough briefing. Id. at 683. The Second Circuit then affirmed the summary judgment on grounds **raised for the first time at oral argument**, reasoning the issue was discussed in post-trial briefs, the issue was explored in discovery and supplemental briefs had been requested. Id. at 639.

In Charbonnages De France v. Smith, 597 F.2d 406 (4th Cir. 1979), the Fourth Circuit held an appellate court is "not bound on review to consider only those specific grounds upon which the district court based its grant of summary judgment, but could affirm if [it] perceived alternative grounds." Id. at 416. The Fourth Circuit however, declined to affirm on alternative grounds, reasoning "summary judgment was not warranted on any alternative basis" supported by the record. Id.

Finally, Chamness cites Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) which, upon close examination, does not even speak to the issue at hand. In Ramirez, the Court rejected a dissent by the minority (which, incidentally, included Justice Scalia) attempting to convert a district court's order granting of a Rule 12(b)(6) Motion to Dismiss into a summary judgment. Id. at 1536. The D.C. Circuit rejected the dissent's argument that Rule 12(b) permitted a motion to dismiss to be converted to a summary judgment because the rule was intended to apply to the **trial** court, not the appellate court. Id. at 1537. The D.C. Circuit did recognize, however, that if the trial court record and pleadings "squarely raised" the alternative issue such that the relevant facts had been explored, affirming the trial court's dismissal on an alternative theory in a *sua sponte* motion for summary judgment would be appropriate. Id.

Chamness argues that these cases demonstrate inconsistency between the appellate courts "concerning when a Court may *sua sponte*... affirm [summary judgment] on grounds not raised in the motion." Petition, p. 7. However, the authorities cited by Chamness do not provide this Court with any basis for determining that there is a "split of authority" or a "lack of certainty" as to the standards which must be applied when a court of appeals utilizes the Alternative Basis Principal. By contrast, each of these cases recognize the standard which is clearly enunciated in the very opinions Chamness references. Additionally, none of these cases are factually similar to the case at hand. The Texas law relied upon was raised in the Response

to Chamness' Motion to Reconsider in the District Court, noted in the Order accompanying the Final Judgment of the District Court, and briefed for the Fifth Circuit. Therefore, any exception allegedly created by the authority cited by Chamness is clearly not applicable.

4. *Chamness Had Full Opportunity to Respond.*

a. *Fountain* is Inapplicable.

Apparently acknowledging the lack of authority, Chamness then completely abandons his "inconsistency" argument and reasons that it is simply "improper for a court of appeals to grant summary judgment in the absence of a fair opportunity for a non-movant to set forth grounds for denying the motion for summary judgment." Petition, p. 7 *citing* Fountain v. Filson, 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971 (1949). This is not the issue before the court today; nonetheless the comment does raise some interesting points in the history of the case. But before addressing whether Chamness had a "fair opportunity" to present opposing evidence, it should be pointed out how the Fountain case is clearly distinguishable from the present facts.

Fountain involved a grant of summary judgment by an appellate court in favor of a non-moving plaintiff on a claim which had not been advanced by the plaintiff. Fountain, 336 U.S. at 682. The appellate court reasoned that a request for "other relief" in the petition was a sufficient request for summary judgment. Id. The Supreme Court held that this amounted to a denial of opportunity for the defendant to dispute the facts relied upon by the court of appeals as no motion had been filed by the plaintiff; therefore the defendant had no reason to bring any disputing facts before the Court. Id. at 683. Quite to the contrary, in the present case, the Fifth Circuit affirmed a ruling of District Court in favor of the moving party. Additionally, as set forth in more detail below, Chamness had a **full and fair opportunity** to present facts which disputed the summary judgment evidence relied upon by the Fifth Circuit, but chose not to file any response despite numerous extensions. For these reasons, the Fountain case is simply not on point.

b. Chamness Failed to Use Opportunity

Recognizing he had an opportunity to oppose the Motion for Summary Judgment, Chamness asserts he did not file a response to the FDIC's

Motion for Summary Judgment because he did not dispute the summary judgment evidence; namely (1) that he made a representation; and (2) that the original lender had been placed in receivership. Petition, p. 9. Apparently because the words "estoppel to claim homestead" did not appear in the motion, Chamness determined there was **no need for a response** to the summary judgment. Chamness even goes so far as to call filing a response a "fool's errand". Id. This comment demonstrates Chamness' cavalier attitude toward his entire case while in the trial court, an attitude which resulted in a dismissal as a sanction for failure to comply with numerous court orders. Interestingly though, the response which Chamness claims he would have filed had he been made aware of these "unknown" legal theories, is factually the same response he should have filed.

In Chamness' Appellants' Brief to the Fifth Circuit (attached as Appendix B), Chamness challenged the District Court's bar of Chamness' homestead claim, primarily relying upon the case of Patterson v. FDIC, 918 F.2d 540 (5th Cir. 1990), wherein the Fifth Circuit rejected the FDIC's attempt to utilize 12 U.S.C. §1823(e) as a bar to a plaintiff's homestead claims. Appendix B, p. 18b. Chamness correctly argued that Patterson holds that a homestead right "exists independent of any agreement of the parties." Appendix B, p. 11 (citing Patterson and In Re Howard, 65 B.R. 498, 503 (Bankr. W.D. Tex. 1986)). Relying upon this authority, Chamness concluded:

> Claims and defenses **based on facts and circumstances** existing at the time an instrument was executed in favor of a failed bank are not barred by FDIC superpowers.

Appendix B, p. 18b (emphasis added). Chamness then argued:

> [T]he Chamness family homestead existed because of the Family's actual possession, use, and occupancy of it, not because of any agreement not reflected in MBank's official files... The homestead claim arose because of facts, it was not based on understandings, schemes, representations or agreements.

Appendix B, p. 19b.

By Chamness' own acknowledgement, and under the authority of Patterson and Howard, to defeat the motion for summary judgment by asserting the protections of D'Oench, Duhme and/or 12 U.S.C. §1823(e), it is necessary to produce evidence of actual use and/or possession of the property. In other words, to defeat the D'Oench, Duhme theory, Chamness needed evidence that his homestead rights were derived from "actual possession, use, and occupancy," i.e., that his claim was not based upon a "secret side agreement." *See* Patterson; Howard. However, Chamness failed to provide this or any evidence, and the Fifth Circuit properly accepted the facts contained in the motion for summary judgment as true. Eversley v. MBank Dallas, 843 F.2d 172, 174 (5th Cir. 1980). As a result, the uncontroverted summary judgment evidence was that Chamness' did not use, possess or occupy the property as his homestead. Petitioner's Appendix A, p. 6.

By the same token, the estoppel argument on which the Fifth Circuit based its decision is applicable in circumstances where the borrower has made non-homestead declarations at a time they were not in actual use and possession of the property. In Re Niland, 825 F.2d, 801, 808 (5th Cir. 1987); Patterson, 918 F.2d at 547. Therefore, whether Chamness was opposing a summary judgment based upon the protections afforded under federal law (D'Oench, Duhme and/or §1823(e)) or the protections afforded by Texas law (estoppel to claim homestead), the evidence brought before the District Court would have been the same: evidence showing that at the time the Non-Homestead Affidavits were executed, Chamness was in actual use and possession of the property. Only with such evidence could Chamness establish a homestead claim that was not based upon "an agreement, scheme, or bank representation." *See* Patterson, 918 F.2d at 545.

Finally, and most importantly, Chamness continues to ignore his total failure to respond to the pending motion for summary judgment. Rather, Chamness prefers to characterize himself as a naive plaintiff who was blindsided by the procedural machinations of the federal court system. Nothing could be further from the truth. As noted by the Fifth Circuit, Chamness was granted "repeated extensions of time" for filing a response to the motion for summary judgment, but failed to do so. Petitioner's Appendix A, p. 6. Such failure to respond was not due to any act of the District Court, any Defen-

dant, nor any outside forces. The failure to take advantage of this "opportunity to respond" lays squarely on the shoulders of Chamness.

In conclusion, the Fifth Circuit's affirmation of the District Court's summary judgment is consistent with the practices of every Circuit Court of Appeals and the Supreme Court. Additionally Chamness had a full and fair opportunity to create fact issues in response to the summary judgment, but elected not to do so. As a result, this Court can take no action other than the denial of this Petition for Writ of Certiorari.

C. Judgment in Favor of Wikert Does Not Deny Due Process to Chamness

In his second argument to this Court, Chamness claims he has been denied due process by the Fifth Circuit's *sua sponte* summary judgment in favor of Respondent Wikert. Chamness argues that because Wikert did not have a motion for summary judgment pending in the trial court at the time the case was dismissed, the Fifth Circuit has improperly granted summary judgment for Wikert. Once again Chamness is off the mark.

The ruling of the Fifth Circuit clearly determines that Chamness has "absolutely" no homestead interest. Petitioner's Appendix, p. 7. As explained above, Chamness' claim against Wikert is based solely upon the fact that she purchased the property in connection with the foreclosure of the complained of lien. Wikert has not committed, nor has Chamness complained of, any independent acts which warrant any other claim. As such, when the Fifth Circuit affirmed the summary judgment reasoning that no homestead claim existed, it necessarily made a ruling which determined the fate of Chamness' claim, even absent Wikert's own Motion for Summary Judgment. Therefore, the dismissal of the claim against Wikert was proper. See Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1537 (D.C. Cir. 1984). See also Jaffke v. Dunham, 352 U.S. 280, 281, 77 S. Ct. 301, 1 L. Ed. 2d 314 (1957) ("A successful party in District Court may sustain its judgment on any ground that finds support in the record") and Dandridge v. Williams, 397 U.S. 471, 475 fn. 6, 90 S. Ct 1153, 25 L. Ed 2d 491 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not the ground was relied upon or even considered by the trial court").

Chamness contentions that the grant of summary judgment violates his due process necessarily implies that he would have prepared a substantially different response (or at least **a** response) to the pending summary judgment if Wikert had also made such a motion. However, Chamness completely fails to show how he has been prejudiced, and instead implies that attorneys would violate their ethical duties of fair advocacy and risk malpractice in hopes of "sneaking one" by an opposing party. The cold, hard reality is simply that Chamness completely failed to provide any summary judgment evidence, not that Chamness' best efforts were crushed by an unyielding judicial system. Chamness arguments ring hollow in their cry of denial of due process.

WHEREFORE, PREMISES CONSIDERED, Appellee Alinda Hill Wikert requests that this Court deny the Petition for Writ of Certiorari and grant such other and further relief to which Appellee Wikert may show herself justly entitled.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT
ALINDA HILL WIKERT

- Appendix A -

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD E. CHAMNESS, RHEA ANN CHAMNESS, LISA C. CHAMNESS, RONALD E. CHAMNESS, JR. AND HOLLY A. CHAMNESS,	§	
Plaintiffs,	§	
V.	§	CIVIL ACTION NO. 3:89-CV-1117-P
FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR M-BANK DALLAS, N.A., DEPOSIT INSURANCE BRIDGE BANK, N.A. OREGON, INC., WILLIAM R. TRIONE, AND ALINDA HILL WIKERT,	§	
Defendants.	§	

ORDER

On August 24, 1990, Judge Robert Porter signed a Memorandum Opinion and Order in which he ruled on the motions for summary judgment of Defendants Federal Deposit Insurance Corporation (FDIC), Deposit Insurance Bridge Bank, N.A., Oregon, Inc., and William R. Trione and motions for sanctions of these defendants and defendant Alinda Hill Wikert. Judge Porter held that the D'Oench-Duhme doctrine precluded the claim of homestead asserted

by Plaintiffs in this case and granted summary judgment for all defendants except Alinda Hill Wikert. Judge Porter also granted all of the defendants' motions for sanctions and ordered that all of Plaintiffs' claims be dismissed with prejudice against all defendants. Judgment was not entered pending the judge's ruling on the issue of attorneys fees on which the parties were to submit affidavits. At the time of entry of the Memorandum Opinion and Order, judgment would have been partial because one of the defendants had a counterclaim pending against plaintiff Ronald E. Chamness. That counterclaim has apparently now been discharged in bankruptcy. (see motion of Ronald E. and Rhea Ann Chamness to Dismiss their claims against Defendants William Trione and Oregon, Inc).

On July 23, 1991, and prior to Judge Porter's ruling on attorneys fees, plaintiffs Ronald E. and Rhea Ann Chamness filed for bankruptcy. The bankruptcy stay was lifted on June 8, 1992. Subsequent to the lifting of the bankruptcy stay, plaintiffs Ronald and Rhea Ann Chamness filed a Motion to Reconsider and Vacate Judge Porter's Memorandum Opinion and Order of August 24, 1990 and a motion to dismiss their claims against defendants FDIC, Oregon, Inc. and William Trione. Plaintiffs ronald E. Chamness, Jr., Holly A. Chamness, and Lisa C. Chamness filed motions to dismiss all of their claims as to all defendants. In response, the defendants filed motions opposing the motion to reconsider, opposing the dismissal of any of the plaintiffs' claims without prejudice, and motions to strike and objecting to late filed discovery responses of plaintiffs. The late filed discovery responses is an apparent attempt by plaintiffs to correct some of the conduct for which Judge Porter imposed sanctions in his Memorandum Opinion and Order of August 24, 1990.

For reasons set forth below, the court denies plaintiffs Ronald E. and Rhea Ann Chamness' motion to reconsider and motion to dismiss defendants FDIC, Oregon Inc. and William Trione, and denies plaintiffs Ronald E. Chamness, Jr., Holly A. Chamness and Lisa C. Chamness' motion to dismiss their claims.

Motion to Reconsider

In their motion to reconsider, plaintiffs advance two main arguments. First, that the August 24, 1990, order is in error because it incorrectly applied the D'Oench-Duhme doctrine to preclude

plaintiffs' homestead claim. Second, that dismissing the case as an imposition of sanctions was improper because there was no discussion in the order of the consideration of any lesser sanction and, a review of the record reveals that the extreme sanction of dismissal was inappropriate.

In support of their first argument, plaintiffs cite the case of Patterson v. FDIC, 918 F. 2d. 540 (5th Cir. 1990) as an "identical case that was decided against the FDIC." In the Patterson case, the court held 12 U.S.C. § 1823(e) was not "so broad as to override the Texas Homestead Laws... we hold that under the facts of this case, § 1823(e) does not preclude Patterson from attempting to prove her homestead under Texas law.", Patterson, at 545. Defendants counter that Patterson is inapposite because it involved 12 U.S.C. § 1823(e) and not the D'Oench-Duhme doctrine and cite the case of Buchanan v. FSLIC, 935 F.2d. 83 (5th Cir. 1991) where the court held that the D'Oench-Duhme doctrine could preclude assertion of a homestead claim. Defendants also argue that plaintiffs are estopped from asserting their homestead claim because at the time that plaintiffs executed the affidavit of Non-Homestead, they were not occupying the residence in question.

The Court finds that on both of their arguments, the defendants are correct. Under Texas law, someone who represents that certain property is not his homestead and he is not occupying the property when the representation is made, is estopped from later making a homestead claim as to that property. As part of its motion for partial summary judgment, the FDIC submitted the affidavit of C.C. Prudhomme III, an employee of Bank One, Texas, formerly known as Deposit Insurance Bridge Bank. Attached to this affidavit are five exhibits (A-E) which are copies of five documents that plaintiff Ronald E. Chamness executed on four different dates. In each of these document, Chamness represents that the property in question is not his homestead. Exhibit B is a Non-Homestead Affidavit executed by Chamness on June 3, 1981. In it Chamness states, under oath, that "He does not now reside upon" the property in question. Exhibit D is an affidavit executed by Chamness on June 21, 1983. In this affidavit Chamness states, under oath, that he purchased the property in question in May, 1979, and began extensive renovation work on it in June, 1979. In paragraph three of that affidavit, Chamness

states that the property "was not ready for occupancy until August 20, 1991, and was not occupied." This summary judgment evidence has not been controverted, and was accepted by Judge Porter as undisputed in his Memorandum Opinion and Order of August 24, 1990. The Homestead Affidavit dated June 11, 1980, and the Non-Homestead Affidavit dated June 3, 1981, were executed by Chamness when he was not residing in the property in question. The plaintiffs are, therefore, estopped as a matter of law from asserting their homestead claim. Patterson, supra., and cases cited therein.

Additionally, in Buchanan, supra., the court stated that in determining whether D'Oench applied to bar a party's claim, the applicable test was whether the party "lent himself to a scheme or arrangement whereby the banking authority on which the FDIC relied in insuring the bank was or as likely to be misled." Under that test, the court looks at the "relative culpability of the party making the claim." Buchanan, supra., at 85. It is clear from the evidence recited above that the plaintiffs have lent themselves to a scheme to mislead the banking authorities, and are now precluded, under the D'Oench-Duhme doctrine, from asserting their homestead claim against the defendants.

Plaintiffs also seek reconsideration of Judge Porter's decision to dismiss all of plaintiffs' claims as an imposition of sanctions. The Fifth Circuit has stated that dismissal of a case as a sanction will be upheld where there is a showing of "a clear record of delay or contumacious conduct by the plaintiff and when lesser sanctions would not serve the best interests of justice." Sturgeon v. Airborne Freight Corp., 778 F.2d 1154 (5th Cir. 1985). In summary, the record in this case reveals that plaintiffs have failed to produce documents in response to two Requests for Production of Documents filed by the FDIC. In particular, the record with respect to the First Request for Production is illuminating with respect to plaintiffs' conduct in this case. That request was filed on September 13, 1989. On October 26, 1989, the FDIC filed a Motion to Compel. Various negotiations ensued between the parties and the motion to compel was not heard. Plaintiffs' counsel was allowed to withdraw by Magistrate Judge Tolle by order dated December 20, 1989, but Judge Tolle informed the parties that his order did not "extend the dates upon which response to outstanding discovery requests must be made." Neverthe-

less, the documents were not produced, and on February 21, 1990, the FDIC sent Chamness a letter requesting that he produce the documents requested. On March 2, 1990, the FDIC filed its second Motion to Compel. On March 12, 1990, after a hearing, Judge Tolle ordered plaintiffs to produce the documents by March 30, 1990. At the hearing, Judge Tolle told Chamness personally that no more extensions of time would be forthcoming. On March 27, 1990, plaintiffs filed another motion for extension of time seeking more time to file a response to defendants motion for partial summary judgment and to extend the discovery and scheduling deadlines. This was plaintiffs' seventh motion for extension of time. After a hearing on April 2, 1990, the motion was denied by Judge Tolle. In his order denying plaintiffs' request for more time, Judge Tolle stated, "Plaintiffs have shown nothing which would justify further delay in this case. Plaintiffs have repeatedly asked for extensions of time to file required responses and to extend scheduling deadlines, and this Court has repeatedly granted those requests. At a hearing on March 12, 1990, the undersigned magistrate once again granted Plaintiffs' request for extension of time, but advised Plaintiff Chamness personally that no further extensions of time would be forthcoming." Judge Tolle's order of March 12, 1990, ordering production of the documents by March 30, 1990, was not complied with, and on April 9, and May 18, 1990, the FDIC sent letters to plaintiffs requesting production of the documents. As of the date of Judge Porter's Order of August 24, 1990, plaintiffs had still not complied with Judge Tolle's order.

The record also shows that plaintiffs had not complied with Judge Tolle's order of March 12, 1990, that documents be produced by March 30, 1990, pursuant to the FDIC's Second Request for Production of Documents filed on December 8, 1989. Additionally, plaintiffs failed to comply with Requests for Admissions, and Interrogatories were answered nine days late and were not answered under oath.

By order dated October 4, 1989, Judge Porter required the parties to submit a joint Pre-Trial Order by June 22, 1990. By motion of March 27, 1990, plaintiffs sought to have that deadline extended. The motion was denied by Judge Tolle in his order of April 2, 1990, but plaintiffs failed to participate in the preparation and submission of a joint Pre-Trial Order.

Plaintiff also failed to file any response to the defendants' motions for summary judgment, even though the time for filing responses was extended twice.

Finally, in his Memorandum Opinion and Order of August 24, 1990, Judge Porter noted that plaintiffs had not filed responses to two motions for sanctions filed by the FDIC in June, 1990, nor to two motions for sanctions filed by defendant Wikert also in June, 1990. These motions for sanctions were the basis for the dismissal of plaintiffs' claims by Judge Porter. In their July 28, 1992, Motion to Reconsider, plaintiffs, for the first time, challenge the motions for sanctions filed by the defendants. This is over three years after the motions were filed by defendants and almost three years since Judge Porter entered his Memorandum Opinion and Order.

Judge Porter found that plaintiffs had "repeatedly engaged in willful and bad faith conduct" with respect to meeting deadlines and court orders and with respect to discovery. After a review of the record, this court agrees with those findings and with the finding that dismissal of Plaintiffs' claims was the appropriate sanction.

Plaintiffs' Motions to Dismiss

Plaintiffs' Ronald E. Chamness and Rhea Ann Chamness seek dismissal of their claims against defendants FDIC, Oregon, Inc., and William Trione. Plaintiffs Ronald E. Chamness, Jr., Lisa C. Chamness, and Holly A. Chamness move to dismiss all of their claims as to all defendants. Rule 41(a) (1), Fed. Rules Civ. Proc., allows a plaintiff to dismiss claims prior to service of an answer or of a motion for summary judgment. In this case, the defendants had both answered and filed motions for summary judgment. Rule 41(a) (2) allows dismissal of a suit by plaintiffs only "upon order of the court and upon such terms and conditions and the court deems proper."

Under the facts of this case, the court does not believe it would be proper to grant plaintiffs' motions to dismiss. The motions are untimely made, having been filed almost three years after the court had ruled on the merits of this case and found against the Plaintiffs.

Accordingly, it is ORDERED that plaintiffs Motion to Reconsider and Vacate Memorandum Opinion is denied, as are all plaintiffs' motions to dismiss. Since the counterclaim by Bank One against Chamness is no longer in the case, and the issue of attorney's fees

has been waived by the defendants, the court will enter final judgment for the defendants in accordance with this order and the Memorandum Opinion and Order of August 24, 1990.

SO ORDERED

SIGNED this 29th day of April, 1993.

/s/_____
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

- Appendix B -

NO. 93-1486
IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

RONALD E. CHAMNESS AND RHEA ANN CHAMNESS,
Appellants,

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., DEPOSIT INSURANCE BRIDGE BANK, N.A., OREGON, INC., WILLIAM R. TRIONE, and LINDA HILL WIKERT,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

BRIEF FOR THE APPELLANTS
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ATTORNEYS FOR APPELLANTS

NO. 93-1486

IN THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

RONALD E. CHAMNESS AND RHEA ANN CHAMNESS,

Appellants,

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., DEPOSIT INSURANCE BRIDGE BANK, N.A., OREGON, INC., WILLIAM R. TRIONE, and LINDA HILL WIKERT,

Appellees.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies the following list of persons have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualifications or recusals.

The following individuals have an interest in the outcome of this appeal:

1. Ronald E. Chamness, Appellant and Plaintiff Below;
2. Rhea Ann Chamness, Appellant and Plaintiff Below;
3. Lisa C. Barfield (formerly Chamness,) Plaintiff;
4. Ronald E. Chamness, Jr., Plaintiff;
5. Holly A. Chamness, Plaintiff;
6. William R. Trione, Appellee; and
7. Alinda Hill Wikert, Appellee.

The following corporations are involved or are concerned with this appeal:

1. Deposit Insurance Bridge Bank, N.A.;
2. Oregon, Inc.; and
3. Bank One, N.A.

The following government agency or agencies are concerned with this appeal:

1. Federal Deposit Insurance Corporation, as receiver for MBank Dallas, N.A.

The following law firms and counsel have been involved or are presently involved in this case:

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STATEMENT REGARDING ORAL ARGUMENT

Appellants request an opportunity to make oral argument to the Court. The issues in this case include complex issues regarding the interplay between Texas homestead and bank regulation law, including, but not limited to the D'Oench-Duhme doctrine and 12 U.S.C. §1823(e). These issues have been addressed by the Fifth Circuit Court of Appeals in prior written opinions, and the conflict between the ruling by the District Court in this case and the Fifth Circuit Court's prior rulings compels counsel for Appellant to request oral argument. There are also a number of discovery requests and responses in this case which are the subject matter of a "death penalty" Sanctions Order; to avoid any confusion, Appellants' counsel wish to make themselves available to the Court for clarifications of any such questions.

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ARGUMENT NO. 1 ..... 16b

The District Court erred in granting the FDIC's Motion for Partial Summary Judgment, as neither the D'Oench-Duhme doctrine nor 12 U.S.C. §1823(e) prohibit the assertion of homestead in the face of conflicting statements contained in a failed bank's official file.

ARGUMENT NO. 2 ..... 20b

The Trial Court erred in entering death penalty sanctions dismissing the appellants' claims because there was no discovery abuse, a pretrial order was filed, and the Appellants were therefore deprived of a trial without due process of law.

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NO. 93-1486

IN THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

RONALD E. CHAMNESS AND RHEA ANN CHAMNESS,

Appellants,

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., DEPOSIT INSURANCE BRIDGE BANK, N.A., OREGON, INC., WILLIAM R. TRIONE, and LINDA HILL WIKERT,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

BRIEF FOR THE APPELLANTS
RONALD E. CHAMNESS AND RHEA ANN CHAMNESS,

STATEMENT OF JURISDICTION

The Fifth Court of Appeals of the United States of America properly has jurisdiction over the appeal presented herein pursuant to 28 U.S.C. §1291. The judgment against Appellants was entered on the 29th day of April, 1993, and Appellants timely filed their notice of appeal within thirty (30) days thereafter.

STATEMENT OF ISSUES

1. Did the District Court improperly grant summary judgment in favor of Defendant FDIC on the grounds that D'Oench-Duhme and 12 U.S.C. §1823(e) precluded the Appellants' homestead claim under applicable Texas law; and
2. Did the District Court err in entering Death Penalty Sanctions dismissing Appellants' claims?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

This case commenced when Plaintiffs Ronald E. Chamness ("Ronald Chamness"), Rhea Ann Chamness (who is referred to herein with Ronald Chamness as "Mr. and Mrs. Chamness"), Lisa C. Chamness, Ronald E. Chamness, Jr. and Holly A. Chamness (collectively "the Chamness Family") filed an Original Petition in the 134th Judicial District Court of Dallas County, Texas against MBank Dallas, N.A., Oregon, Inc., William R. Trione and Linda Wikert (the "Original Defendants"). The Chamness Family claimed that certain real property and improvements located at 4208 Armstrong Parkway in Highland Park, Texas constituted the homestead of the Chamness Family pursuant to the Constitution of the State of Texas and the statutes enacted thereunder. The Original Petition further claimed that a purported foreclosure of certain deeds of trust against the homestead was void. The Chamness Family claimed the deeds of trust were improper clouds upon the title to the homestead. The Chamness Family also sought damages and attorney's fees.

Subsequent to the filing of the original Petition in state court, MBank, N.A. failed. The Federal Deposit Insurance Corporation ("FDIC") appeared in the case and removed the case to federal court.

The FDIC, in its capacity as receiver, continued its defense against the monetary claims asserted against MBank by the Chamness Family. Deposit Insurance Bridge Bank ("DIBB") entered an appearance as an additional Defendant, apparently the holder of the counterclaim originally asserted by MBank.

While the case was pending before the Northern District of Texas, Dallas Division, the District Court entered a Memorandum Opinion and Order granting a motion by FDIC for summary judgment and motions by FDIC and Defendant Wikert for sanctions pursuant to Rules 16(f) and 37. (This Order is hereinafter referred to as the "Memorandum Opinion".) In the Memorandum Opinion, the District Judge (the Late Honorable Robert W. Porter) ordered that judgment be entered against the entire Chamness Family pursuant to FDIC's Motion for Summary Judgment and that the Family's claims be dismissed pursuant to Rules 16(f) and 37. The Court further directed that proceedings be held to determine attorneys fees to be awarded to all Defendants. Prior to ruling on the attorneys fees requested and entering further orders or a final judgment, Judge Porter died. The Memorandum Opinion marked the beginning of an approximate 30-month period during which no further action was taken by the District Court.

After a replacement District Judge (Honorable Jorge Solis) was appointed to the bench, Mr. and Mrs. Chamness filed motions for reconsideration and vacation of the Memorandum Opinion. Mr. and Mrs. Chamness also sought to dismiss their claims against the FDIC and the MBank related defendants [Oregon Inc., FDIC, DIBB, and Trione]. If granted, these motions would have resulted in a simple suit by Mr. and Mrs. Chamness against Wikert alone, as the purported purchaser of the property. The members of the Chamness Family, other than Mr. and Mrs. Chamness, requested voluntary dismissals of all of their claims.

On April 29, 1993, the District Court denied all of the Chamness Family members' motions, and entered judgment in accordance with the Memorandum Opinion. It is from this judgment that Mr. and Mrs. Chamness now appeal.

B. Statement of Facts.

The following statement of facts is compiled from the uncontested facts appearing from the record in this case and are primarily

drawn from the FDIC's Motion for Partial Summary Judgment. [The Motion and exhibits to the Motion referred to herein, are contained in the appendix to this Brief.]

On May 17, 1979, Ronald Chamness and A. Marlene Chamness purchased two lots in Dallas County, Texas known as Lots 12, 14, Block 103, Highland Park West, Number 1 from the Estate of Florence M. Moss. The street address for this property is 4208 Armstrong Parkway, Highland Park, Texas (the "Armstrong Property"), *Volume 5, Page 25.* Ronald Chamness took possession of the Armstrong Property and proceeded to renovate it in June, 1979. *Id.* From the date Ronald Chamness purchased the Armstrong Property until August 20, 1980, the Chamness Families lived at 6550 Cliffbrook, Dallas, Texas 75240 (the "Cliff brook Property") . *Id.* Ronald Chamness claimed a homestead exemption at the Cliffbrook property, until he moved from it on August 20, 1980. id. The improvements to the Armstrong Property consisted of a dwelling or a house. *Id.* Subsequent to Ronald Chamness purchase of the Armstrong Property and subsequent to the abandonment of the Cliffbrook Property, Chamness granted deeds of trust (which are relevant to these proceedings)[1] against the Armstrong Property as follows:

January 9, 1981 — A Deed of Trust to Curtis Hawley, Trustee, given to secure a guaranty of an unspecified date, and a Note dated December 18, 1980, (owing to Republic National Bank of Dallas] which deed of trust is referred to hereinafter us the "Hawley Deed of Trust." *Vol. 5, pp. 63-69.* Chamness executed a subordination agreement at the time wherein he agreed the property did not "constitute his homestead." *Vol. 5, pp. 105-109.*

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[1] There are other documents contained in the exhibits to the Motion for Summary Judgment filed by FDIC containing homestead "waivers", but since they are irrelevant and remote in time from the Republic, First City and MBank transactions, they are not discussed. FDIC's inclusion of these items demonstrates the breadth FDIC would give D'Oench-Duhme and 12 U.S.C. §1823(e), as these documents related to earlier real estate transactions to which MBank was not even a party.

June 3, 1981 — A Modification to the Hawley Deed of Trust was executed to increase the debt to Republic Bank; *Vol. 5, pp. 75-80;* along with a "NonHomestead Affidavit" whereby any homestead rights in the Armstrong Property were purportedly renounced. *Vol. 5, p. 73.*

June 21, 1983 — A Deed of Trust to Dewaine V. Hill, Trustee, was executed by Chamness to secure a note to First City Bank in the sum of $2,550,000; along with an affidavit the Armstrong property was not Chamness' homestead. *Vol. 5, pp. 8596.* This Deed of Trust is referred to hereinafter as the "Hill Deed of Trust". The proceeds of the Note to First City Bank, secured by the Hill Deed of Trust, paid off the Hawley Deed of Trust Note. *Vol. 5, p. 5.*

March 9, 1984 — A Deed of Trust to Jim Reynolds, Trustee, was executed by Chamness to secure a guaranty in favor of MBank of apparent business debts of CM Mechanical Corporation of $7.5 million. *Vol. 5, p. 97.* This deed of trust is hereinafter referred to as the "Reynolds Deed of Trust." The Reynolds Deed of Trust contained a purported homestead renouncement and disclaimer.

March 8, 1985 — MBank takes an assignment of the Hill Deed of Trust. *Vol. 5, p. 5.*

After granting the deeds of trust described above, Ronald Chamness obligations to MBank came to be in default, and MBank purported to exercise its rights under the Hill Deed of Trust and the

Reynolds Deed of Trust.[2] Foreclosure of the Armstrong Property allegedly occurred on June 3, 1986. *Vol. 1, p. 8.* In that foreclosure, the Armstrong Property was allegedly auctioned by MBank officer, William Trione ("Trione"), to Oregon, Inc. ("Oregon") , an MBank subsidiary. *Id.* The Armstrong Property was then allegedly conveyed by Oregon in a prearranged transaction, on the same day, to Defendant Wikert. *Id. at 8-9.* Thereafter, the Chamness Family commenced this suit, seeking a declaration that the purported foreclosure of the Hill and Reynolds Deeds of Trust had no legal effect, was improper, that the members of the Chamness Family were the rightful owners of the Armstrong Property, and that each were entitled to damages against all Defendants. *Id. at 7-14.*

Subsequent to the filing of the Original Petition, MBank failed and the FDIC removed the proceeding to the District Court. *Vol. 1, p. 1.*

During the pendency of the case, several motions concerning discovery were filed by the parties and discovery was propounded by each side. A more detailed description of the facts surrounding these procedural matters is contained in the *Argument No. 2* section of this Brief. *Infra.*

FDIC filed a Motion for Partial Summary Judgment on the basis that the official MBank files, of which FDIC had taken possession in its capacity as receiver, contained non-homestead declarations, and therefore the D'Oench-Duhme doctrine and 12 U.S.C. §1823(e) barred the Chamness Family's claim of homestead. *Vol. 5, pp. 1-9.* In addition, the FDIC filed a 164 page brief in support of the Motion, where the FDIC's sole argument was that the Chamness suit could not be maintained insofar as the Chamness Family's claims contradicted the official bank file in the FDIC's possession. Additionally, all Defendants filed a motion for sanctions under Federal Rules of Civil Procedure 37 and 16(f). *Vol. 2, pp. 476-479; Vol. 2, pp. 480-488; Vol. 2, pp. 489-496; Vol. 8, pp. 1-11.*

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[2] There is no Summary Judgment evidence that a foreclosure occurred or what liens were foreclosed, this statement is based on the same assumptions made of the District Court. This error is immaterial however since the sole subject of the Summary Judgment granted to FDIC was the global preclusion of homestead rights based on Doench-Duhme and 12 U.S.C. §1823(e).

The Motion for Partial Summary Judgment was granted. The District Court concluded that D'Oench-Duhme and 12 U.S.C. §1823(e) barred all homestead claims by the Chamness Family because such claims contradicted the terms of the documents in the official bank files. *Vol. 3, p. 520.*

The District Court also granted each Defendant's Motion for sanctions, finding:

> that the Plaintiffs have repeatedly engaged in willful and bad-faith conduct: (1) in refusing to adhere to the various deadlines ordered herein, including the submission of a joint pretrial order, and (2) in failing to produce documents responsive to the FDIC's First Request for Production in the time and manner as provided by the Federal Rules, and in direct contravention of the order entered herein by U.S. Magistrate Tolle on 3/12/90. *Vol. 3, p. 524.*

After the Memorandum Opinion was entered, but before further proceedings were had in the case, Judge Porter died. Additionally, during the interim, Mr. and Mrs. Chamness filed a Chapter 7 Bankruptcy case. *Vol. 3, p. 545.* On June 8, 1992, the automatic stay was lifted *(Vol. 3, p. 603),* and on July 2, 1992, 24 days later, Mr. and Mrs. Chamness filed a Motion for Reconsideration and Vacation of the Memorandum Opinion. *Vol. 3, p. 557.* In the Motion for Reconsideration, Mr. and Mrs. Chamness sought relief from the Memorandum Opinion on two grounds: (1) the Fifth Circuit authority published after the entry of the Memorandum Opinion, and other authority, directly conflicted with the legal conclusion in the Memorandum Opinion, that D'Oench-Duhme and 12 U.S.C. §1823(e) precluded the assertion of homestead rights against contrary statements in a failed bank's official file; and (2) the death penalty sanction was excessively harsh and not meted out according to Fifth Circuit guidelines. Vol. 3, p. 557. On April 29, 1993, the District Court (Honorable Jorge Solis) denied the motion to reconsider and entered judgment in accordance with the Memorandum Opinion.[3]

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[3] Pursuant to the rule stated in Youmans v. Simon, 791 F.2d 341, 349 (5th Cir. 1986), Mr. and Mrs. Chamness claim error in the memorandum opinion, not the order denying Plaintiff's Motion for Relief from that opinion, although that same error was repeated in the order denying the Motion.

SUMMARY OF THE ARGUMENT

Issue 1. Did the District Court improperly grant summary judgment in favor of Defendant FDIC on the grounds that D'Oench-Duhme and 12 U.S.C. §1823(e) precluded the Appellants' homestead claim under applicable Texas Law?

Argument No. 1. The District Court erred in granting the FDIC's Motion for Summary Judgment, as neither the D'Oench-Duhme doctrine nor 12 U.S.C. §1823(e) prohibit the assertion of homestead in the face of conflicting statements contained in a failed bank's official file.

Issue 2. Did the District Court err in entering the Death Penalty Sanctions against Appellants, on the grounds stated in the Court's order?

Argument No. 2. The Trial Court erred in entering Death Penalty Sanctions dismissing the Appellants' claims because there was no discovery abuse, a pretrial order was filed, and the Appellants were therefore deprived of a trial without due process of law.

ARGUMENT NO. 1

Issue No. 1. Did the trial court err in granting summary judgment in favor of Defendant FDIC on the grounds that D'Oench-Duhme and 12 U.S.C. §1823(e) precluded the Appellants' homestead claim under applicable Texas Law?

Argument No. 1. The trial court did err in granting the FDIC's Motion for Partial Summary Judgment, as neither the D'Oench-Duhme doctrine nor U.S.C. §1823(e) prohibit the assertion of homestead in the face of conflicting statements contained in a failed bank's official file.

The Chamness Family suit was brought on the basis that the Family owned, occupied, and used the Armstrong Property as its homestead and that the disclaimers of homestead and non-homestead affidavits executed by **Ronald Chamness** were ineffective. *Vol. 1, p. 8.* It is well established that a homestead cannot be "declared" away by a Texas resident and disclaimers of homestead rights are of no effect, barring additional facts. See In re Niland, 825 F.2d 801 (5th Cir. 1987). In the case at bar the FDIC asserted that MBank's failure was such an additional fact and it filed a Motion for Partial Summary Judgment based **solely** on its claims that D'Oench-Duhme and 12 U.S.C. §1823(e) prohibited the Chamness Family homestead claim. The FDIC's Motion was granted in the Memorandum Opinion, upon which judgment was later entered.

The District Court erred in granting the **sole** defense asserted in the Motion by FDIC for the Chamness Family homestead claim. The District Court applied the D'Oench-Duhme principle [D'Oench-Duhme & Co. v. FDIC, 315 U.S. 447 (1942)] and 12 U.S.C. §1823(e) to prohibit the homestead claim. However, in Patterson v. FDIC, 918 F.2d 540 (5th Cir. 1990), an identical case was decided against the FDIC. In Patterson, the Fifth Circuit rejected the FDIC's argument that 12 U.S.C. §1823(e) precluded contradiction of a homestead designation for the reason that a homestead right "exists independent of any agreement between the parties." Patterson, 918 F.2d at 843, *citing with approval,* In Re Howard, 65 B.R. 498, 503 (Bankr. W.D. Tex. 1986) *which relied upon* FDIC v. Bluerock Shopping Center, 766 F.2d 744, 753 (3d Cir. 1985). The Court correctly noted, in Patterson, that D'Oench-Duhme and 12 U.S.C. §1823(e) preclude defenses based on "agreements," not defenses based on facts.

The facts in Patterson (which were much more developed than in the case at bar, insofar as the homestead claimant Jeanne Patterson, was at least afforded a trial) are basically identical to those claimed to exist by the FDIC in the case at bar: (i) a deed of trust had been given a bank to secure a note, (ii) a document containing a statement inconsistent with a later claimed homestead was executed by the homestead claimant and was found by the FDIC in a failed bank portfolio, and (iii) the FDIC sought to enforce the note and deed of trust in slavish respect of the documents in the failed bank's official files. Patterson at 918 F.2d 541-542. The superpowers granted by 12 U.S.C. §1823(e) and the prodigy of D'Oench Duhme were an appealing argument to the trial court in Patterson, as in the case at bar. During trial, Jeanne Patterson was not allowed to present any evidence to the jury that the property in question was used as a homestead. The trial court in Patterson apparently believed that the statements in the failed bank's official file were elevated to the status of dogma by the FDIC superpowers, and that reality was of little or no significance.[4] The Fifth Circuit Court clearly distinguished Patterson's

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[4] Apparently the District Court in the case at bar found these superpowers pervasive as well as powerful, since it held that D'Oench-Duhme and 12 U.S.C. 1823(e) barred not only Ronald Chamness' claims, but those of the entire Chamness Family. Only Ronald Chamness signed a document inconsistent with a homestead claim.

situation from the 'scheme' defenses and agreements, that D'Oench-Duhme and 12 U.S.C. §1823(e) preclude. Patterson 918 F.2d at 543. The Patterson court declared that **claims and defenses based on facts and circumstances existing at the time an instrument was executed in favor of a failed bank are not barred by FDIC superpowers.** Id. at 545. On the other hand, the Patterson court noted that a defense based on an "agreement, scheme, or bank representation" was a defense that the superpowers of the FDIC barred. *Id.* at 545. To illustrate the distinction in Patterson, this Court cited Templin v. Weisgram, 867 F.2d 240 (5th Cir. 1989) cert. denied. In Templin, the Court noted that a side agreement, an agreement between banker and borrower, that a sale of a homestead was a sham, was the type of agreement to which the FDIC superpowers applied "full force." Templin 867 F.2d at 242. In other words, this Court recognized that D'Oench-Duhme and 1823(e) are ineffective as to defenses not dependent upon agreements.

There are other landmark cases which illustrate the distinction noted in Patterson. On the one hand there are the scheme, arrangement, or agreement cases. These cases have one common element not existing in the case at bar - the defense was based on an (i) agreement, (ii) an understanding, or (iii) a communication from or to an agent of the failed financial institution. Examples of this type of defense are evident from a review of this Court's and the Supreme Court's leading cases:

Templin: Homestead claimant's claims depended upon knowledge that purported sale of homestead was a sham. Supra. The first paragraph of the opinion reveals that a borrower, a banker and a third party **agreed** to stage a sale of the homestead, and that it was not to be effective.

Langley: Borrower claimed a defense to suit on a note based on **oral promises** from a bank officer. Langley v. FDIC, 484 U.S. 86 (1987).

D'Oench-Duhme: Borrower had **secret agreement** with bank officer that facially enforceable note would not be enforced pursuant to its terms. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, (1942).

Buchanan: Homestead claim was premised on refuting an **agreement** between homestead claimant and an aluminum siding contractor that a lien was granted before commencement of improvements to homestead when in fact they were not. The agreement be-

tween Buchanan and the contractor was clearly an agreement to enable the contractor to get funds from the failed bank. Buchanan v. FSLIC, 935 F.2d 83 (5th Cir. 1991).

On the opposing shore, defenses based on independent facts, not agreements, schemes, or understandings, survive the FDIC superpowers:

Patterson: Homestead defense "existed" independent of any agreement because of **use of property** by homestead claimant. Supra. at 543.

Texas Refrigeration Supply: Complaints regarding timely acceleration or the disposition of collateral are based on the **nature of negotiable instruments** and are not eliminated by D'OenchDuhme or 12 U.S.C. §1823 (e). In Texas Refrigeration Supply, the entire analysis of the court in making its determination of the applicability of the FDIC superpowers was to distill each claim and defense down to its factual elements and then determine if one element was an agreement with the failed institution or a representation of such institution. Texas Refrigeration Supply, Inc. v. FDIC, 953 F.2d 975 (5th Cir. 1992).

Garrett: Neither D'Oench-Duhme nor 1823(e) prevent claims or defenses which are independent of agreements, such as **breach of duty or negligence** by failed bank. Garrett v. Commonwealth Mortgage Corp. of America, 938 F.2d 591, 595 (5th Cir. 1991).

The pattern and direction of the Fifth Circuit in distinguishing claims and defenses based on agreements, express or implied, from "real" claims of defenses was noted only months prior to the publication of Patterson with uncanny accuracy by Texas Legal Scholars. *The Texas Homestead Protections: A Chink in the Section 1823(e)/ D'Oench, Duhme Armor,* 21 Tex. Tech. L. Rev. 104 (1990).

In the case at bar, the Chamness Family homestead existed because of the Family's actual possession, use, and occupancy of it, not because of any agreement not reflected in MBank's official files. Mr. and Mrs. Chamness were precluded from presenting facts to demonstrate their actual use and occupancy of the Armstrong Property, because it would have conflicted with the official bank file of MBank. This analysis flies in the face of the Fifth Circuit authorities note above. The homestead claim arose because of facts, and was not based on understandings, schemes, representations or agreements. Accordingly,

Mr. and Mrs. Chamness are entitled to proceed to a trial to prove their homestead rights.

ARGUMENT NO. 2

Issue 2. Did the District Court err in entering the death penalty against Appellants, on the grounds stated in the Court's order?

Argument No. 2. The Trial Court erred in entering Death Penalty Sanctions dismissing the Appellants' claims because there was no discovery abuse, a pretrial order was filed, and the Appellants were, therefore, deprived of a trial without due process of law.

The record in this case shows that the Chamness Family's lawsuit was dismissed and that they were deprived of the opportunity to present their argument on the merits, for the preservation of their homestead, without any showing of discovery abuse. Instead, a review of the record reflects that the Chamness Family responded to all discovery requests in the time permitted by the rules or the deadlines required by the Court with the exception of a 9 day tardiness in serving answers to interrogatories. There is absolutely no showing in the record of any evidence where any member of the Chamness Family failed to disclose, in response to a discovery request by the Defendants, responsive material in the possession of any member of the Family. The end result was that the Plaintiffs were deprived of a trial on the merits based on the Defendants' aggressive and voluminous mischaracterization of Plaintiffs' efforts to comply with discovery.[5]

The various motions for sanctions filed by the FDIC and Wikert complain of alleged misconduct by the Chamness Family in the following particulars:[6]

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[5] Apparently the FDIC subscribes to a formulation of Immanuel Kant's "categorized imperative" and that all things it thinks exist, in fact do. Accordingly if it thinks a deposition exists it does, and if it tells the trial court that the Chamnesses are "process abusers" enough, the Court believes it, and the Chamnesses therefore are "process abusers".

[6] The record demonstrates that the Defendants engaged in a "Ramboesque" effort to deprive the Chamness family of a trial on the merits by burying them in a mountain of discovery and filing repetitive and redundant complaints concerning the family's good faith efforts at compliance. It should be noted that the First and Second Requests for Production were submitted to Ronald Chamness only.

1. response to the FDIC's first request for admissions;

2. response to the FDIC's first request for production;

3. response to the FDIC's second request for production;

4. answers to FDIC's interrogatories; and

5. pretrial order.

Mr. and Mrs. Chamness will describe their good faith compliance with the discovery requests and pretrial order separately as follows.

1. **First Request for Admissions**

Defendant FDIC served 140 requests for admission on or about March 27, 1989. Vol. *1, p. 121.* The response date for the request for admissions was extended by agreement to May 11, 1989. *Vol. 1, p. 122.* Subsequently, the parties entered into lengthy negotiations, seeking to resolve the Chamness Family's objections to certain requests for admission on the grounds that they sought admissions as to legal conclusions. The Chamness Family's efforts to fully cooperate in responding are detailed in the "Plaintiffs' Suggestions in Opposition to Defendant's Motion to Deem Admissions." *Vol. 2, p. 250.* By September 20, 1989, 121 of the 140 requests had been admitted or denied or the FDIC no longer sought a response because of Chamnesses' objections as to such request. *Vol. 1, p. 251.* As admitted by the FDIC, the parties finally arrived at a "genuine dispute as to interpretation of law" as to 19 requests for admissions, which were submitted to the Court for determination. *Vol. 1, p. 123.* As to those 19 Requests, FDIC specifically agreed not to request sanctions. *Vol. 1, p. 188.* On November 13, 1989, U.S. Magistrate Tolle signed an order which required answers by November 27, 1989. *Vol. 2, p. 272.* Ronald Chamness filed answers on November 24, 1989. *Vol. 3, p. 703.* Thus, by November 24, 1989, all of the requests for admission to which the FDIC sought responses had either been admitted, denied, or objected to in a timely manner. Despite this fact, the FDIC refers to the Responses to Requests for Admission in its motion for sanctions of March 2, 1990. *Vol. 6, p. 1-16.* Again the

FDIC used innuendo and misrepresentations. Later the FDIC again refers to the request for admissions in its motion for sanctions of June 18, 1990 as if they have relevance and establish improper conduct. *Vol. 8, p. 1.*

Because the FDIC had twice referred to the request for admissions in motions for sanctions and because the answers were not contained in current counsel's files, Mr. and Mrs. Chamness' new counsel was misled into believing the admissions had never been answered and therefore submitted answers to requests for admission. *Vol. 2, p. 570.* The FDIC for the first time, then admitted that the first request for admissions had already been answered in November, 1989 and complained of the second answers proposed by Mr. and Mrs. Chamness' new attorneys. *Vol. 3, pp. 599 and 687.* Thus, with regard to the first request for admissions, they were timely answered within the time required by the U.S. Magistrate.

2. First Request for Production

On or about September 13, 1989, the FDIC submitted its first request for production to Ronald Chamness. *Vol. 1, p. 230-335.* This request sought copies of depositions given by Ronald Chamness in various other litigation matters. The request specifically requested depositions given in the Industrial Indemnity v. CM Corp., SPW v. National Mechanical Corp., Arab Bank Ltd. v. CM World, Glaser Leasing v. Chamness, and Firemans Fund Insurance v. Chamness. *Id.* Ronald Chamness timely filed responses and objections to the request on October 9, 1989. *Vol. 1, p. 237.* On or about October 26, 1989, the FDIC then filed a motion to compel production. *Vol. 1, p. 219.* Counsel for the FDIC admitted that the Firemans Fund deposition and the Industrial deposition had been produced. *Vol. 2, pp. 309-310.* On or about March 12, 1990, the Honorable U.S. Magistrate Tolle ordered that the documents responsive to the FDIC's first request for production be produced by March 30, 1990. *Vol. 2, ID. 333.* As demonstrated by the Affidavit of Ronald Chamness, there were no other depositions available to be produced. *Vol. 3, p. 562.* The SPW v. National deposition could not be, with due diligence, located. *Id.* This deposition had no relevance to the issues in this case. *Id.* There were no depositions in either of the two other lawsuits. At no time have the Defendants alleged, and there is no evi-

dence in the record which demonstrates, that there were any additional documents not produced in response to the first request for production. Instead, the Defendants simply built a case with innuendo and mischaracterization, asking for sanctions on grounds that the Chamness Family failed to produce documents. Again this occurred without any evidence that any additional depositions actually existed. The references to the alleged discovery abuse in the various motions for sanctions relating to the first request for production never make clear that the documents which are sought are depositions. Therefore, the implication is that there are documents which Ronald Chamness never produced. The record, on the other hand, clearly demonstrates that Ronald Chamness produced all depositions which existed or could be located within the time required by the Court.

3. Second Request for Production

On or about December 8, 1989, the FDIC served its second request for production. *Vol. 7, p. 1.* This request sought voluminous documents. On or about December 20, 1989, the Chamness Family counsel withdrew because of non-payment of attorneys' fees. *Vol. 7, p. 22.* Despite being pro se, Ronald Chamness timely filed a Motion to Extend Time to Respond to Second Request for Production of Documents. *Vol. 2, p. 301.* On or about January 27, 1990, the Honorable U.S. Magistrate Tolle granted Ronald Chamness pro se Motion to Extend and extended the time to produce the requested documents until February 23, 1990. *Vol. 2, p. 312.* On February 22, 1993, the Ronald Chamness timely filed a pro se Motion to Enlarge Time to Respond to the FDIC's Second Request for Production. *Vol. 2, p. 317.* This Motion explained that there were 20 boxes of documents shipped from his former counsel in Kansas City and sought time to review the documents to ensure that privileged communications were not disclosed. Ronald Chamness' efforts to contact counsel for the FDIC to discuss the timing of the production of documents and evidencing the efforts to timely comply with Magistrate Tolle's orders are contained in a letter to defense counsel from Ronald Chamness pro se. *Vol. 2, p. 325.* On or about March 12, 1990, the Honorable Magistrate Tolle entered an order requiring the documents to be produced by March 30, 1990. *Vol. 2, p. 333.* On or about April 2, 1990, both Defendants FDIC and Wikert inspected all of the documents

responsive to the second request for production. *Vol. 2, p. 477.* There is nothing in the record to reflect that the records were not tendered on or before March 30 and, again by innuendo, the Defendants have recited the date of the actual inspection to cast the Chamness Family in a bad light. It should be noted that the 30th was a Friday and the 2nd was a Monday. The Defendants did not allege that the inspection on the 2nd was not in timely compliance with Magistrate Tolle's March 12 order, but again recite these facts as a basis for sanctions in complete mischaracterization of the events. As of April 2, 1990, the Chamness Family had timely produced all available documents responsive to both the first and second requests for production.

4. Answers to Interrogatories

On or about March 1, 1990, the FDIC forwarded the first set of interrogatories to the Chamness Family. The interrogatories were answered on or about April 12, 1990. *Vol. 9, pp. 34-41.* The complaint by the Defendants was that the answers were 9 days late and were not signed under oath.[7] It is true that the signature is not notarized; however, the paragraph preceding the signature is in substantial compliance with 28 U.S.C. §1746, and arguably in compliance with the rules. In addition, Ronald Chamness, in an effort to be in absolute compliance with all discovery, and after retaining current counsel, filed notarized answers to the interrogatories supplementing the prior answers. *Vol. 3, p. 703.* The only alleged discovery abuse related to the interrogatories was, therefore, that they were not originally notarized.

In addition, the answers to interrogatories were submitted containing general objections to the definitions, as well as objection responses to interrogatories 3, 4, 5 and 6. The objections are not required to be signed by the party, but may be signed by the attorney making them within the meaning of Fed. R. Civ. P. 33(a).

Fed. R. Civ. P. 37(b) provides comprehensively for sanctions for

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[7] The only answers in the record are unsigned, however the Original Answers in Counsel's file are signed and not notarized. Pursuant to Local Rules of the Northern District of Texas, discovery material is not filed and Chamness' former counsel would have been custodian of the original. Defendants would not have received anything but a copy pursuant to such rules. The Rules are silent as to whether the copy is to be signed or not. See, Local Rules of Procedure, Northern District of Texas, Rule 2.2.

failure to obey discovery orders. It has no application if there has not been a court order ... however, many of the sanctions available under 37(b) are incorporated by reference in Rule 37(d) with regard to interrogatories do not apply when the failure to comply is anything less than a total failure to respond. Fox v. Studebaker Worthington, 516 F.2d 989, 994-995 (8th Cir. 1975) [Citations and other discussions omitted]. In other words, Rule 37(d) sanctions are proper only when there has been a complete or nearly total failure of discovery. Fox v. Studebaker Worthington, at 995. It should be noted however, that under appropriate circumstances, evasive and incomplete, answers to interrogatories can be tantamount to no answers at all. Plywood Antitrust Litigation; French Quarter Apartments, Ltd. v. Georgia, 655 F.2d 627 (5th Cir. 1981).

The answers and objections given by the Plaintiffs here were not evasive. The Defendants failed to file a motion to compel and there is no order compelling more complete, sworn answers to the interrogatories or disobedience of such order. In fact Ronald Chamness' objections were never ruled upon or otherwise addressed. There is, therefore, no basis for determining that Ronald Chamness' answers constitute "no answer" to discovery which would justify the imposition of death penalty sanctions to the entire Chamness Family.

5. Pretrial order

On or about October 4, 1989, the Honorable Court required a pretrial order be submitted by June 22, 1990. The Chamness Family and Defendants filed Pretrial Orders although, not pretrial orders signed by both parties. *Supplemental Transcript.* The factors relating to the submission of a separate pretrial orders are described in the FDIC's Motion for Sanctions. *Vol. 3, pp. 662-663, 671-673.* Apparently, the Defendants submitted their version of a pretrial order because Plaintiffs' counsel had not contacted them by June 20. *Vol. 3, p. 672.* To the extent that the submission of a separate pretrial order was the basis for the sanctions, the record reflects no fault on behalf of the Chamness Family and only arguable fault by their counsel. "Finally dismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client..." Batson v. Neal Spelce Associates, 765 F.2d 511, 514 (5th Cir. 1985). There is absolutely no evidence that the Chamness Family, then represented

by counsel, refused to cooperate with their attorney regarding the preparation of the pretrial order, or that there was any prejudice resulting from the failure to have all parties' signature on the two pretrial orders submitted.

Legal Authority

> The sanctions available under Rule 37(b) for such conduct are predicated upon the presence of such factors as willful disobedience, gross indifference to the right of adverse party, deliberate callousness, or gross negligence. The sanctions are not predicated upon a party's failure to satisfy fully the requirements of production order when the failure was "due to inability fostered neither by its own conduct nor by circumstances within its control. [The Rule] should not be construed to authorize dismissal because of noncompliance of a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any other fault of petitioner."

Dorsey v. Academy Moving and Storage, 423 F.2d 858, 860 (5th Cir. 1970) (Citing Societe Internationale Pour Participations Industrielles Et Commercicales, SA v. Rogers, 357 U.S. 197, 211-212 (1958).

The Fifth Circuit has set out the factors to be considered by the Court in determining what sanction is appropriate under Rule 37:

> But we have also recognized that dismissal is too harsh a sanction where a number of factors, singly or in combination, are present, or where the District Court's relevant findings of historical fact are clearly erroneous. First, dismissal is to be sparingly used and only in situations where its deterrent value cannot be substantially achieved by the use of less drastic sanctions. Whether the other party's preparation for trial was substantially prejudiced is a consideration. Dismissal is generally inappropriate and lesser sanctions are favored where neglect is plainly attributable to an attorney, rather than to his blameless

> client. Nor does a party's simple negligence grounded in confusion or sincere misunderstanding of the Court's orders, warrant a dismissal. Finally, the Rule "should not be construed to authorize dismissal when it has been established that failure to comply is due to inability."

Marshall v. Segona, 621 F.2d 763, 767-768 (5th Cir. 1980) (Citing National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam)).

> "Although our task in reviewing a sanction imposed under Rule 37(b) is to determine whether the district judge abused his discretion in ordering the sanction, we have noted before that a district judge should use the draconian remedy of dismissal with prejudice only in extreme circumstances." Griffin v. Aluminum Co. of America, 564 F.2d 1171, 1172 (5th Cir. 1977). "Deliberate, repeated refusals to comply with discovery orders have been held to justify the use of this ultimate sanction." See also, Emerick v. Fenick Industries, Inc., 539 F.2d 1379 (5th Cir. 1976); Durgin v. Graham, 372 F.2d 130 (5th Cir. 1969) [cert. denied 389 U.S. 941 (1969)].

Bonadventure v. Butler, 593 F.2d 625 (5th Cir. 1979) [Bracketed cite history inserted].

"Although the District Court's discretion under Rule 37 is broad, we have repeatedly emphasized that it is not unlimited, and we have often characterized the dismissal with prejudice as a Draconian remedy, or a remedy of last resort only to be applied in extreme circumstances." Batson v. Neal Spelce Associates, 765 F.2d 511, 515 (5th Cir. 1985). The Court in Batson reversed the District Court's dismissal with prejudice, and noted the absence in the record of any consideration by the District Court of whether a less drastic action than a dismissal with prejudice would have furthered the important deterrent aspect of Rule 37. Id. at 516. It should be noted that in Batson, the matter was remanded to the District Court. The District Court once again dismissed with prejudice, after making express findings that lesser sanctions were not appropriate. This order was affirmed by the

Fifth circuit in Batson v. Neal Spelce Associates, 765 F.2d at 546.

"A district court 'Abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions.'" Olivia v. Sullivan, 958 F.2d 272, 274 (9th Cir. 1992) Citing U.S. v. National Medical Enterprises, Inc., 792 F.2d 906, 912 (9th Cir. 1986). The Ninth Circuit Court of Appeals, in reversing a *sua sponte* dismissal by a district court stated that, "[n]othing in the record demonstrates that counsel was on notice that the case would be dismissed. "Failure to warn has frequently been a contributing factor in our decisions to reverse orders of dismissal." Id. at 274. Admittedly, the facts of the Olivia decision concern the court's sua sponte dismissal of a case in the absence of a motion to dismiss. The Ninth Circuit, however, has stated three factors in determining whether or not a district court has considered alternatives to dismissal:

> "(1) did the court explicitly discuss the feasibility of less drastic sanctions and explain why alternative sanctions would be inadequate? (2) did the Court implement alternative methods of sanctioning or curing the malfeasance before ordering dismissal? (3) Did the court warn the plaintiff of the possibility of dismissal before actually ordering dismissal?"

Malone v. United States Postal Service, 833 F.2d 128, 132 (9th Cir. 1987) cert. denied 488 U.S. 819 (1987). There is absolutely no discussion in Judge Porter's order, or anywhere in the record, of any consideration or discussion of alternatives to the sanction of Dismissal being considered or discussed.

The Ninth Circuit Court has stated five leading factors to be considered by a trial court in determining whether or not to dismiss a case for failure to comply with a court order.

> A district court must weigh five factors in determining whether to dismiss a case for failure to comply with a court order; '(l) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.' 'It is not necessary for a

> district court to make explicit findings to show that it has considered these three factors.'

Malone v. United Postal Service, 833 F.2d at 130. Citing Thompson v. Housing Authority, 782 F.2d 829, 832 (9th Cir.), cert. denied, 107 S.Ct. 12 (1986) and Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986).

A similar standard for review on Rule 37 sanctions is set forth in the Fifth Circuit opinion of Fjelstad v. American Honda Motor Companies, 762 F.2d 1334 (5th Cir. 1985):

> The District Court's 'discretion will not be disturbed unless we have a definite and firm conviction that the Court committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors. Where the drastic sanctions of dismissal or default are imposed, however, the range of discretion is narrowed and the losing party's noncompliance must be due to willfulness, fault, or bad faith. Id. at 1337 Citing U.S. v. Sumitomo Marino and Fire Ins. Co., 617 F.2d 1365, 1369 (9th Cir. 1980). The constitutional basis of the limitations on the use of death penalty sanctions has been recognized by the Fifth Circuit. "Due process limits the imposition of the severe sanctions of dismissal or default to extreme circumstances in which the deception relates to the matters in controversy and prevents their imposition merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case." Fjelstad 162 F.2d at 1338.

A recent article in the Texas Bar Journal fully discusses the Constitutional limitations on the "death penalty" sanctions.

> "A case of the Fifth Circuit, Bonair Hotel, Inc. v. Time, Inc., captures the Constitutional sensitivity of the United States Supreme Court with regard to the death penalty sanctions, and holds that the dismissal of an action with prejudice is a drastic remedy and should be applied only in extreme circumstances."

Soules and Wallace, Discovery Death Penalty Sanctions Reviews, De Novo Standard 55, Tex. B.J. 135 (1992). "Fairness demands the severe sanction of default may not be imposed under Rule 37(b)(2) in the absence of willfulness, bad faith or fault." Fjelstad at 1340.

> As we have demonstrated above, the discretion of a district court to award sanctions and render judgment based on those sanctions is quite broad. That discretion is bounded at its outer limits, however by constitutional due process concerns.

Frame v. S-H, Inc., 967 F.2d 194, 204 (5th Cir. 1992); See also *USA Const., Amend. V.*

SUMMARY OF ARGUMENT NO. 2

The draconian measure of sanctions dismissal without warning was not warranted in the case at bar for any reason. The sanction was an abrogation of the Chamness Family's constitutional and procedural rights, which were not warranted by the conduct of any member of the Family. The sanction was imposed without the common law safeguards announced in this Court's decisions. The dismissal should be reversed.

CONCLUSION

The District Court erred in this case in two respects. First, it exclusively applied the superpowers granted to the FDIC and used them to defeat the homestead claim of the Chamness Family.

Secondly, the District Court entered the ultimate sanction deprivation of the right to trial - without adhering to the procedural requirements established by the Fifth Circuit Court of Appeals. The Chamnesses pray the Court order that the judgment be set aside, that the Memorandum Opinion be vacated, and that this case be remanded for trial in the District Court.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of this Brief and one copy of Appellants' Appendix/Record Excerpts were served on the 16th day of July, 1993, via hand delivery, upon

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